



Department of Justice

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INTERNATIONAL COMPETITION NETWORK ADOPTS RECOMMENDED PRACTICES TO IMPROVE MERGER ANALYSIS AND ASSESSMENT OF UNILATERAL CONDUCT

Department of Justice Promotes Antitrust Convergence at Kyoto Conference

WASHINGTON — At the seventh annual International Competition Network (ICN) conference in Kyoto, Japan, the ICN adopted new Recommended Practices to improve merger analysis and assessment of unilateral conduct, the Department of Justice announced today. The Cartel Working Group issued a report stressing the importance of effective cartel settlement systems.

The ICN conference, hosted by Japan's antitrust authority, the Japan Fair Trade Commission, was held on April 14-16, 2008. More than 500 delegates and competition experts participated, representing more than 70 antitrust agencies from around the world, along with competition experts from international organizations and the legal, business, consumer and academic communities. Thomas O. Barnett, Assistant Attorney General in charge of the Department of Justice's Antitrust Division, and Federal Trade Commission (FTC) Chairman William E. Kovacic were among the U.S. delegates. The conference showcased the recent work of ICN working groups on mergers, unilateral conduct and cartels.

"The ICN is a leading forum for identifying best practices among antitrust enforcement agencies and promoting international convergence in antitrust enforcement," Barnett said. "The Recommended Practices adopted at this conference are an important milestone in the ICN's efforts to develop consensus in the substantive analysis of mergers and unilateral conduct."

"As competition laws continue to take root throughout the world, the international competition community faces an increasing challenge to ensure that competition agencies can develop and maintain the institutional capacity to be effective champions for consumers. The Kyoto Conference took us another big step on the long journey to building effective, pro-consumer competition agencies. Through its Competition Policy Implementation Working Group and other projects, the ICN is playing a leading role in bringing agencies together to share their experience to strengthen our mutual goal of combating anticompetitive practices and improving the lives of our consumers," said Kovacic.

Based on the work of the Merger Working Group, co-chaired by James J. O'Connell Jr., Deputy Assistant Attorney General for the Antitrust Division, and Dr. Paul Gorecki of the Irish

Competition Authority, ICN members adopted three new Recommended Practices for Merger Analysis. The new Recommended Practices for merger analysis address:

- ***The Legal Framework for Merger Analysis*** – Competition agencies should seek to identify and prevent or remedy only those mergers that are likely to harm competition significantly. Merger review laws and agencies' merger review analysis should provide a comprehensive framework for assessing whether a merger is likely to harm competition significantly.
- ***The Use of Market Shares: Thresholds & Presumptions*** – Market shares and measures of market concentration play an important role in merger analysis by providing useful initial guidance to help identify mergers that may raise competitive concerns requiring further analysis, but generally are not conclusive indicators that a merger is likely to harm competition significantly.
- ***Entry and Expansion*** – The assessment of firm entry and/or expansion by existing competitors should be an integral part of the analysis of whether a merger is likely to harm competition significantly.

The Merger Working Group also presented a detailed report on setting notification thresholds for merger review.

The conference also highlighted the work of the Unilateral Conduct Working Group (UCWG), which was established in 2006 to promote greater convergence and sound enforcement of laws governing unilateral conduct by firms with substantial market power. Based on the work of the UCWG, which is co-chaired by the FTC and the German Bundeskartellamt, ICN members adopted a set of Recommended Practices in this complex area of antitrust law. The new Recommended Practices address the assessment of substantial market power or dominance under unilateral conduct laws. The Recommended Practices provide that, while market shares can be a useful starting point for analyzing substantial market power, a firm should not be found to possess substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation. The Recommended Practices further provide that agencies should use a sound analytical framework, firmly grounded in economic principles, in determining whether a firm has substantial market power, and that assessment of entry and expansion conditions should be an integral part of the analysis.

The ICN conference also highlighted the work of the Cartel Working Group, which aims to reduce obstacles that antitrust agencies face in cracking cartels through the exchange of effective investigative techniques and the examination of important legal and policy topics. In Kyoto, the Cartel Working Group presented a report discussing the use of settlements in cartel investigations, such as the use of plea agreements in the United States, and the issues faced by anti-cartel enforcers in designing and implementing effective cartel settlement systems.

“The way in which the Antitrust Division utilizes plea agreements to induce cooperation and build its cases is an important topic among the world's competition enforcers,” said Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement of the Department of

Justice's Antitrust Division. "The Cartel Settlements Report makes a valuable contribution by exploring how different jurisdictions approach this issue and by identifying the key benefits – both to enforcers and cooperating defendants – of effective settlement systems."

The Competition Policy Implementation Working Group addressed ICN initiatives to assist newer antitrust agencies. The Group presented a study of what makes a competition agency effective, especially from an institutional and operational point of view; and presented an approach for sharing expertise between more and less experienced competition agencies.

Consistent with the ICN's emphasis on promoting practical convergence on antitrust substance and process, a conference panel also showcased member agencies' progress in implementing the ICN's recommended practices, as well as their use of ICN reports, workbooks, and other work product.

ICN documents are available at www.internationalcompetitionnetwork.org.

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